

No. 82-912

In the Supreme Court of the United States
OCTOBER TERM, 1982



FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

*ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA*

JOINT APPENDIX

FREDRIC D. WOOSHER
LUCAS GUTTENTAG
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**APPEAL DOCKETED: DECEMBER 1, 1982
FURTHER QUESTION OF JURISDICTION POSTPONED
TO HEARING OF THE CASE ON THE MERITS:
February 28, 1983**

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LEAGUE OF WOMEN VOTERS OF CALIFORNIA,
HENRY WAXMAN; PACIFICA FOUNDATION, PLAINTIFFS
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

No. 79-1562

DATE	NR.	PROCEEDINGS
4/30/79	pg	1. Fld complt. Issd summs. Case maybe ref to Mag. Penne. 2. Fld Req & Ord for svc of proc by other than the USM, namng Alletta d'A Belin.
6-13-79	dg	3. Fld rtn of sms, servd FCC on 4-30-79
6-29-79	dg	4. Fld Stip & ORD ext ti for dft to ans complt to 7-30-79
7-30-79	gll	5. Fld deft's ANSWER TO COMPLAINT.
7-30-79	gll	6. Fld ORD (MML) re early meeting; mand stat conf 11-5-79, 10 am.
8-24-79	gll	7. Fld stip re joint stat rpt.
8-27-79	gll	LODGED pltf's prop 1st A/C. LODGED pltf's prop ord.
8-28-79	gll	8. Fld ORD (MML) that purs to stip fld 8-24-79 pltf's may file amd complt. 9. Fld pltf's FIRST AMENDEE COMPLAINT
9-12-79	lf	10. Fld deft's ANSWER TO FIRST AMENDED COMPLT
9-24-79	rlb	11. Fld plfs' ntc of Mot & mot, rtnbl 11/5/79, 10 am, for S/J. 12. Fld plfs' memo of P/As in suppt mot for S/J. 13. Fld affd of Waxman in suppt Mot for S/J. LODGED plfs' proposed finds of fact & concl of law.—PLACED IN FILE, NOT USED LODGED plfs' proposed S/J—PLACED IN FILE, NOT USED
*9-19-79	yd	14. Fld Stip & ORD re time for flng pltf's S/J mot
10-23-79	yd	15. Fld Stip & ORD ext ti to 11-15-79 for deft to resp to pltf's mot for S/J; plts shall fle their reply no latr than 11-26-79; matt'r rescheduld for hrg 12-3-79
11-16-79	yd	16. Fld Stip & ORD ext ti for deft to resp to pltf's motn for S/J to 1-18-80; plts shall fle reply no latr than 1-28-80 & if Crt approves that this matt'r be rescheduled for hrg on 2-4-80, 10AM
1-17-80	yd	17. Fld note of Senate's motn to appear as Amicus Curiae retnbl 2-4-80, 10 AM

	yd	18. Fld memo in suppt of Senate's motn to dismiss
	yd	19. Fld note of Senate's motn to dismiss retnbl 2-4-80, 10AM
	yd	20. Fld note of Senate's motn to defer resp to motn for S/J retnbl 2-4-80, 10AM
	yd	LODGED prop ORD—PLACED IN FILE, NOT USED
1-18-80	yd	21. Fld deft's resp to pltfs' motn for S/J
1-28-80	yd	22. Fld US Senate's aff of srvc of cpy of Senate's note of motn & motn to appear as amicus curiae & supptng memo; Senate's note of motn & motn to dismiss & supptng memo; Senate's note of motn & motn to defer to pltfs' motn for S/J prop Ord submitted by Senate
	yd	23. Fld US Senate's note of app of Michael Davidson & Charles Tiefer as cnsl for US Senate in case
1-29-80	yd	24. Fld Stip & ORD that ti for pltfs & deft to resp to Amicus applicant Senate's motns to appear as Amicus Curiae & to dismiss case ext to 2-11-80; Senate shall file reply no later than 2-21-80 & these motns reschedule for hrg on 3-3-80
2-13-80	yd	25. Fld deft's resp to Senate's motn to appear as Amicus Curiae & motn to dismiss
	yd	26. Fld pltfs note of motn & motn ti disallow Senate's motn to dismiss retnbl 3-3-80, 10AM
	yd	27. Fld pltfs memo in suppt of pltfs' motn to disallow filing of Senate's motn to dismiss
	yd	28. Fld pltfs memo of nonopp to Senate's motn to appear as Amicus Curiae
	yd	29. Fld pltfs memo in opp to Senate's motn to dismiss; declaratns of Joel Kugelmass, Susan F. Rice; Henry A. Waxman in suppt
2-25-80	lf	30 Fld senate reply in supp of mtn to dismiss 31 Fld aff of serv of reply of senate in supp of mtn 32 Fld Senate's memo in reply to pltfs memo of nonoppos to mtn to appear as amicus & in oppos to mtn to disallow filing of Senate's mtn to dismiss
2-27-80	yd	33. Fld pltfs' reply in suppt of motn to disallow Senate's motn to dismiss
3-3-80	yd	34. MIN ORD: US Senate's motn to appear as Amicus Curiae is GRANTED. Crt allows filing of Senate's motn to dismiss. Motn to dismiss is argued to Crt & Crt takes motn to dismiss under submissn

3-7-80	yd	35. Fld Movant to Appear as Amicus Curiae suppl memo on O'Hair v. United States
	yd	36. Fld Movant to Appear as Amicus Curiae aff of srvc of cpy of Senate's suppl memo on O'Hair v. United States on 3-6-80
3-10-80	yd	37. Fld ORD granting US Senate's motn to appear Amicus Curiae, denying pltf's motn to disallow filing of Senate's motn to dismiss & granting Senate's motn to dismiss actn (ENT 3-11-80) Mld cpys & Note
3-14-80	yd	38. Fld pltf's note of resetting prev noted motn for S/J retnbl 4-7-80, 10AM
4/24/80	fb	39. Fld pltf's NOTICE OF APPEAL to the 9th Cir. C/A fr ord ent on 3/11/80. \$65.00 docket fee paid.
5-2-80	srl	40. Fld pltf's reports trans designtn
8-4-80	kt	41. Fld pltf's designtn of clk's recrd on appeal
1-26-81	cg	42. Fld pltf's designation of clk's recd
2/17/81	rz	43. Fld amicus curiae design of clk's record
3/25/81	fb	—Issd & fwd to C/A lcc of Clk's rec on appeal.
4/13/81	rz	44. MIN ORD: ORDS that the ord of rem issd by 9CCA on 4/10/81 is set fr filing & spreading upon the rec of this crt on 4/17/81, 9:30 AM. ORD that cnsl to prepar written status rpts to be fi in this crt by 4/16/81, 4PM
4/13/81	rz	45. Recvd fm 9CCA cpy of ord of rem to dist crt fr 56 dys.
4/16/81	rlb	46. Fld plf's status report.
		47. Fld def't's status report.
4/29/81	rlb	48. MIN ORD: Fling & Spreading: ORD the ORD of REmand of the USCCA remanding act to USDC for fur action be & is fld & spread. (Ent 4/30/81) Made REopening JS-5
5-7-81	sb	49. Rec'd cpy C/A ord ex & motn for clarification granted to 6-22-
5-19-81	sb	50. Fld def't's memo on remand from crt of appeal re jurisdiction
5/21/81	lp	51. MIN ORD: Crt on its own mot, ORDS that Ord of USCA for 9th cir fld 4/30/81, extending the tim of remand to 6/22/81, be & hereby is fld & spread upon the recrd of crt. (ENT 5/22/81)
5-29-81	sb	52. Fld pltf's memo on remand from the crt on appeal re jurisdictn
6-1-81	sb	53. Fld motn of Senate to w/draw
	sb	54. Fld memo of Senate in suppt of motn to w/draw

6-8-81	sb	55. MINORD: crt grant US Senate motn to w/draw from the case, crt takes question of jurisdctn under submission
6-18-81	sb	56. Fld ORD (MML) Vacating dism & setting briefing schedule
7-13-81	sb	57. Fld pltf's supplemntal memo of P/A in suppt of motn fr S/J
7-22-81	sb	58. Fld deft's statmnt of genuine issve of material fact 59. Fld deft;s memo of P/A in opp to pltf motn fr S/J
7-27-81	sb	60. Fld pltf's reply memo of P/A in suppt of motn fr S/J
7-28-81	sb	61. Fld pltf's addendum to pltf reply to memo of P/A in suppt of suppt of motn fr S/J
8-3-81	sb	62. MIN ORD: pltf motnfr S/J cont to 9-28-81 10am pltf supplemntal motn before 8-24-81 opp NLT 2wks
8-12-81	sb	63. Fld pltf's Stip & Ord (MML) pltf openinf brief due 8-28- deft's resp 9-15 pltf reply 9-22-81 Crt hrg on 9-28-81
8-10-81	sb	64. Lodged copy of jugh fr C/A that appeal dismissed
8/18/81	jcd	65. MIN ORD: Flg & Spreading of Mandate frm USCCA, 9th Circ. ORD that the Mandate frm USCA, 9th Circ Dsmng the appeal, w/o prej, is fld & Spread upon the recs of this Dist Crt. (ENT 8/20/81)
8-31-81	sb	66. FLD pltf's 2nd memo of P/A in suppt of motn fr S/J
9-15-81	sb	67. Fld deft supplemental memo on amendment of Section 399
9-23-81	sb	68. Flô Ord cont oral arg on pltf motn fr S.J until 11-9-81 & Granting pltf lv to file amended complt (MML) 69. Fld pltf second reply to memo of P.A in suppt of motn fr S/J
10-2-81	sb	64. Fldpltf SECOND AMENDED COMPLT fr declaratory & injuntive relief against enforcement of 47 U.S.C. § 399
10-2-81	sb	65. Fld pltf note of filing second amende complt prop S/J amende prop finding of fact & cocncl of law retbel 11-23-81 10am hrg

66. Fld pltf delcar of Jim Berland
 LODGED AMENDED PROP S/J
 LODGED AMENDED pro finding of fact & con cl of law
- 10-13-81 sb 67. Fld deft memo in suppt of motn to dism the second amended complt
 68. Fld deft note of motn & motn to dism 11-9-81 10am
- 10-26-81 sb 69. Fld pltf memo in opp to deft motn to dism
 70. Fld pltf notecof change of address
- 11-9-81 sb 71. MIN ORD: dfet motn to dism 2nd A/C pltf motn fr S/J under submission
- 8/5/82 rlb 72. FLD ORD GRANTING S?J in fv plf. (Ent 8/6/82 m/cpys & ntfd prtys)
 73. Fld SUMMARY JUDGMENT & ORD thereon that plfs' Mot for S/J is GRANTED & Fur ORD the prohibition agnst editorializing contained in 47 USC 399 is unconstitutional as a viol of the 1st amendment to US constitution & is hereby declared null & void; dft FCC, etc are enjoined frm forcing or execution the prohibition agnst editorializing contained In 47 USC 399; plfs shall rcvr costs & reasonable attys fees. (Ent 8/6/82 m/cpys & ntfd prtys)
- 8/27/82 gth 74. Fld stip & ORD (MML) that defts motn to altr or amd jdmt be cont to 11/1/82. Fur plts respons shall be fld & srvd on defts cnsl by express mail no later than 10/1/82. Defts reply shall be fld & srvd on plts cnsl by express mail no later than 10/20/82
- *8/18/82 gth 75. Fld deft's note of motn to alter or amd jdmt retnbl 9/20/82, 10
- 9/3/82 am 76. Fld deft's NOTC OF APPEAL to Supreme Ct frm ord ent 8/6/82.
- 9/7/82 gth 77. Fld pltfs applic for awrd of costs & reasonabl attys fees; memo of P&As in suppt thereof; declaratns of Fredric D. Woocher, Carlyle W. Hall, Francis M. Wheat, Nancy L. Jones, Mary Jane Merrill, Henry A. Waxman, & Sharon Maeda
- 10/4/82 gth 77. Fld ptlf's memo in opp to deft's motn to altr or amd jdmt
- 10/22/82 gth 78. Fld deft's reply brief in suppt of its motn to altr or amd jdmt

- 11/1/82 gth 79. MIN ORD: Crt ORD previous awrd of atty fees is strickn frm jdmt. Pltfs opp to deft motn to amd jdmt is deemd a motn for atty fees & deft's motn to amd jdmt is deemd opp to a motn for atty fees. Motn for an awrd of attys fees is arg to Crt. Crt taks motn undr submissn
- 11/12/82 gth 80. Fld stip & ORD (MRP) that ti for pltfs to respnd to dfets 1st req for prod of docs & defts 1st set of interros shall be cont 30 days aftr this Crt rules on pltfs motn for an awrd of costs & reasonabl attys fees
- *10/20/82 gth 81. Fld defts ex parte applic & ORD (MML) that ti for deft to file be extended to 10/24/82.
- 12/13/82 kmb 82. Fld pltfs' submissn of additnl authority re pltfs' motn for award of costs & reasonable attys' fees.
- 12/27/82 wa 83. Fld pltfs subm of addit'l authrty re pltfs' mot for award of costs & reasonable attys' fes.
- 3-3-83 kmb LODGED cc of ord fm Supreme Crt: Consideratn of the questn of jrsdctn is postpond to the hrg on the case on the merits.

FREDRIC D. WOOCHEE
 LUCAS GUTTENTAG
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UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 79-1562 MML (Px)

LEAGUE OF WOMEN VOTERS OF CALIFORNIA;
 HENRY WAXMAN; PACIFICA FOUNDATION, PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

SECOND AMENDED COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF AGAINST ENFORCEMENT
 OF 47 U.S.C. § 399

I. INTRODUCTION

1. This is an action to invalidate, and enjoin the enforcement of, the prohibition against editorializing contained in 47 U.S.C. § 399, as amended by § 1229 of the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730. Section 399, as amended, provides: "No non-commercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part [47 U.S.C. § 396] may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for political office." Plaintiffs, a citizens' organization founded to promote political responsibility through informed and active participation of citizens in government, an individual listener and viewer of noncommercial programming, and a chain of noncommercial broadcasting stations, challenge § 399's ban on editorializing as violating the First and Fifth Amendments to the United States Constitution.

II. JURISDICTION AND RELATED MATTERS

2. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1331(a) since this action arises under the Constitution and laws of the United States. Because this action is brought against the Federal Communications Commission, an agency of the United States, no amount in controversy need be shown.

3. The jurisdiction of this Court is also invoked pursuant to the provisions of 28 U.S.C. §§ 2201, 2202, as this action seeks a declaration of the rights of plaintiffs under 47 U.S.C. § 399 and the First and Fifth Amendments to the United States Constitution.

III. PARTIES

4. Plaintiff League of Women Voters of California (hereinafter "League") is a non-profit non-partisan organization incorporated in the State of California. It has approximately 13,000 members in 80 local chapters in California. The purpose of the League is to promote political responsibility through informed and active participation of citizens in government. Its principles include a belief in representative government and in the individual liberties established in the United States Constitution, and a conviction that democratic government depends upon the active participation of a knowledgeable citizenry. The League's objective of educating the electorate is illustrated by its pamphlets and by its sponsorship of political debates, including the televised California gubernatorial debates of 1978 and local "candidate nights" in which those seeking public office are presented to voters. The League also analyzes election ballot measures and presents the issues to voters both in written form and through the broadcast media. In addition, the League takes positions on selected issues and ballot measures after its members have studied and come to agreement. To disseminate its views, the League often seeks out broadcast editorials favorable to its position, or seeks to reply to editorials opposing its viewpoint. If noncommercial broadcasters were not prohibited by 47 U.S.C. § 399 from engaging in editorializing, the League would seek their editorial support just as it has done with commercial broad-

casters. And if noncommercial broadcasting stations were to broadcast editorials, the League's members would listen to such editorials.

5. Plaintiff Henry Waxman, suing in his individual capacity, is the United States Congressman representing the 24th Congressional District in California, which includes portions of the City of Los Angeles and the unincorporated area of Los Angeles County. From December 1975, to January 1979, plaintiff Waxman was a member of the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce (hereinafter "subcommittee"). In his capacity as a member of that subcommittee, he actively participated in deliberations on the Public Telecommunications Financing Act of 1978 (H.R. 12605), and proposed as a section of that Act, an amendment to the Federal Communications Code which would have abolished the prohibition on editorializing by noncommercial broadcasters contained in 47 U.S.C. § 399. Plaintiff Waxman is also a regular listener and viewer of noncommercial radio and television broadcasts. Plaintiff Waxman has in the past and continues to desire to hear the editorial opinions of noncommercial broadcasting stations, yet he has been denied access to such opinions because of the prohibition on editorializing contained in 47 U.S.C. § 399.

6. Plaintiff Pacifica Foundation (hereinafter "Pacifica") is a non-profit educational corporation which owns and operates noncommercial FM radio stations in five major markets in the United States: Los Angeles (KPFK), Berkeley (KPFA, KPFB), Houston (KPFT), Washington, D.C. (WPFW), and New York (WBAI). From the inception of the Community Service Grant program, Pacifica has received funds from the Corporation for Public Broadcasting, and each of its stations currently receives, and anticipates that it will continue to receive, a grant from the Corporation under subpart C of Part IV of the Federal Communications Act of 1934. Hence Pacifica and each of its stations are prohibited from editorializing pursuant to 47 U.S.C. § 399. Established in 1946, Pacifica now has over 50,000 listener-sponsors and 400,000 listeners weekly. One out of five Americans is within range of Pacifica broadcasts.

Pacifica was established, *inter alia*, to promote the full distribution of public information and the study of political and economic problems, to aid creative activities serving the cultural welfare of the communities it serves, and to provide accurate, objective, comprehensive news on all matters vitally affecting the communities. The ability to provide an arena for in-depth inquiry and discussion of a wide range of ideas is fundamental to Pacifica's achievement of these objectives. Were it not for the prohibition against editorializing contained in 47 U.S.C. § 399, Pacifica would broadcast its views on various important public issues, and would clearly label those views as being editorials broadcast on behalf of the Pacifica management.

7. Defendant Federal Communications Commission (hereinafter "Commission" or "FCC") is an administrative agency created pursuant to 47 U.S.C. § 151 for the purpose of regulating radio and wire communication. The Commission is charged with executing and enforcing the provisions of the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.*, including 47 U.S.C. § 399.

IV. FIRST CAUSE OF ACTION

8. 47 U.S.C. § 399's prohibition against editorializing is unconstitutional on its face and as applied to plaintiffs in that it violates plaintiffs' rights to freedom of speech and the press under the First Amendment to the United States Constitution by denying noncommercial educational broadcasting stations which receive a grant from the Corporation for Public Broadcasting the right to editorialize and by denying members of the broadcast audience access to such editorials.

9. Plaintiffs League of Women Voters of California, Henry Waxman, and Pacifica Foundation are irreparably injured by 47 U.S.C. § 399 and have no adequate remedy at law available to them, in that unless this Court grants the relief requested, the FCC will continue to enforce § 399, thereby violating plaintiffs' constitutional rights.

V. SECOND CAUSE OF ACTION

10. 47 U.S.C. § 399's prohibition against editorializing is unconstitutional on its face and as applied to plaintiff

Pacifica in that it violates Pacifica's right to equal protection of the laws under the due process clause of the Fifth Amendment to the United States Constitution by depriving noncommercial educational broadcasting stations which receive a grant from the Corporation for Public Broadcasting of constitutional rights which are exercised by other noncommercial and commercial broadcasters.

11. Plaintiff Pacifica is irreparably injured by 47 U.S.C. § 399 and has no adequate remedy at law available to it in that unless this Court grants the relief requested, the FCC will continue to enforce § 399, thereby violating plaintiffs' constitutional rights.

VI. PRAYER FOR RELIEF

Plaintiffs pray for the following relief:

1. For a judgment declaring that the prohibition against editorializing contained in 47 U.S.C. § 399, as amended by § 1229 of the Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 730, is invalid as a violation of the First and Fifth Amendments to the Constitution of the United States;

2. For an order enjoining defendant, its attorneys, agents, employees, and all others acting in concert with it from enforcing or executing the ban on editorializing contained in 47 U.S.C. § 399;

3. For costs and reasonable attorneys' fees; and

4. For such other further relief as this Court may deem just and proper.

DATED: October 2, 1981

FREDRIC D. WOOCHEE
LUCAS GUTTENTAG
JOHN R. PHILLIPS
CENTER FOR LAW IN THE
PUBLIC INTEREST

/s/ _____
FREDRIC D. WOOCHEE

/s/ _____
LUCAS GUTTENTAG
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes—General

Case No. CV79-1562-MML

Date November 1, 1982

LEAGUE OF WOMEN VOTERS, ET AL.

v.

F.C.C.

PRESENT:

HON. MALCOLM M. LUCAS, JUDGE

DUANE HOSTETTER

Deputy Clerk

DON MEHLER

Court Reporter

ATTORNEYS PRESENT

FOR PLAINTIFFS:

FREDRIC WOOCHEER

ATTORNEYS PRESENT

FOR DEFENDANTS:

JUDITH LEDBETTER, USDJ

PROCEEDINGS:

Counsel are present. The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant motion to amend judgment is deemed a motion for attorney fees and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.

The motion for an award of attorney fees is argued to the Court. The Court takes the motion under submission.

Initials of Deputy Clerk
[illegible]

[October 11, 1979]

Tel: 633-3495

PB: KOlesker:bgg

82-12C-69

Honorable Robert C. Byrd

Senate Majority Leader

United States Senate

Washington, D.C. 20510

Dear Senator Byrd:

In *League of Women Voters of California, et al. v. Federal Communications Commission* (C.D. Cal., No. CV79-1562-MML (PX)), the plaintiffs challenge, on First and Fifth Amendment grounds, the constitutionality of Section 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. §399(a), which prohibits all public broadcasting stations from editorializing and supporting or opposing political candidates. I wish to inform the Senate that the United States will not defend the constitutionality of the statute.

After careful consideration, we have concluded that Section 399(a) violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section 399(a) which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot

be advanced to defend the challenged statute. The Federal Communications Commission has informed us that it agrees that the statute cannot be defended successfully in its present form.

The Department has filed an Answer to Plaintiffs' Complaint to protect your interests should you decide to defend this suit, and the Court has established a briefing schedule. If the Department can be of further assistance to you in explicating the reasons for declining to defend this case or if you or your staff believe it would be helpful to discuss the options that the Senate may wish to pursue, Thomas S. Martin, Deputy Assistant Attorney General, Civil Division, will be pleased to discuss the matter further. He can be reached at 633-3309.

Sincerely,

BENJAMIN R. CIVILETTI
Attorney General

OFFICE OF THE ATTORNEY GENERAL

Washington, D.C. 20530

April 6, 1981

Honorable Strom Thurmond

Chairman

Committee on the Judiciary

United States Senate

Washington, D.C. 20510

Honorable Joseph R. Biden, Jr.

Committee on the Judiciary

United States Senate

Washington, D.C. 20510

Dear Mr. Chairman and Senator Biden:

I am pleased to respond to your letter of February 3, 1981, requesting that I reconsider the decision of the Department of Justice not to defend the constitutionality of 47 U.S.C. § 399(a) in the case of *League of Women Voters v. FCC*, No. 80-5333 (9th Circuit). Please forgive the delay in responding, but we have undertaken a thorough review of the question. I have determined that the Department will participate in the litigation and defend the statute.

The Department appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.

The prior decision not to defend § 399(a) was made by virtue of the conclusion that no reasonable defense of the constitutionality of this provision as a whole could be made. Under applicable Supreme Court precedent, however, even a statute that could have some impermissible applications will not be declared unconstitutional as a whole unless the provision is substantially overbroad and no limiting construction of the language of the statute is possible. Here, for example, the statute's application to political endorse-

ments by government-owned broadcasters might well be held by a court to be constitutional. In that event, the fact that the statute permissibly could be applied in some instances may be sufficient to preclude a finding that the provision as a whole is unconstitutional.

Accordingly, we will advise the Ninth Circuit of our position and request that the case be remanded to the District Court to allow us to present our defense.

Sincerely,

/s/

WILLIAM FRENCH SMITH
Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.,
PLAINTIFFS,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

No. CV 79-1562—
MML(PX).

NOTICE OF DEFENDANT'S MOTION
TO ALTER OR AMEND JUDGMENT

Hearing: September 20, 1982 10:00 a.m.

TO THE ABOVE-NAMED PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 20, 1982, at 10:00 a.m., or as soon thereafter as defendant may be heard, defendant will bring on for hearing before the Honorable Malcolm M. Lucas, its Motion to Alter or Amend Judgment pursuant to Rule 59(e), Fed. R. Civ. Pro., on the ground that the award to plaintiffs of reasonable attorneys' fees is barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412. This motion is supported by a memorandum of points and authorities.

Dated: August 16, 1982

Respectfully submitted

J. PAUL MCGRATH
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In the Supreme Court of the United States

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT.

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 28, 1983